U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 03 2007

SRC 00 005 53080

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved the preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The director rejected a subsequent appeal as untimely and then reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be withdrawn and the petition will be remanded for further action and consideration: issuance of a new NOIR to the correct address and attorney that fully addresses the eligibility issues discussed in this decision.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). Finally, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Id.*

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner left blank the area of proposed employment on the petition but the petitioner held a medical degree at that time. The original brief references research as well as clinical experience but the record contains no evidence that the petitioner had authored any medical research articles as of the date the petition was filed. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director initially approved the petition.

The petitioner was interviewed in 2004 regarding his subsequent Form I-485 Application to Register Permanent Residence or Adjust Status. At that time, it was revealed that he was a student in a Master's degree program. On April 28, 2006, the director issued the NOIR, concluding that the petitioner was no longer intending to continue in the area of work deemed in the national interest. The NOIR was not sent to the petitioner's last known address, as required by 8 C.F.R. § 103.5a(a)(1).

On June 5, 2006, the director revoked the approval of the petition based on the petitioner's failure to respond to the NOIR. The NOR was also not sent to the petitioner's last known address pursuant to 8 C.F.R. § 103.5a(a)(1). The notice stated that an appeal could be filed within 15 days, although 18 days are allowed if service is by mail. 8 C.F.R. § 103.5a(b). We note that while the regulation at 8 C.F.R. § 205.2(d) allows only 15 days in which to *appeal* a notice of revocation, the regulation at 8 C.F.R. § 103.5(a)(1) allows 30 days, 33 if service is by mail, to file a motion to reopen or reconsider. 8 C.F.R. § 103.5a(b). Moreover, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*) provides that an untimely appeal must be treated as a motion if it meets the requirements of a motion. On July 3, 2006, less than 30 days after the NOR, the petitioner filed a Form I-290B, Notice of Appeal to the Administrative Appeals Office. Despite the title of this form, it is the same form on which a petitioner must file a motion. 8 C.F.R. § 103.5(a)(iii). In support of this filing, counsel asserted that the petitioner never received the NOIR or final NOR and requested that the NOIR be reissued, allowing the petitioner to respond.

On July 26, 2006, the director rejected the appeal as late without considering it as a motion or even whether or not it met the requirements of a motion, specifically, whether the NOIR and NOR were properly served upon the petitioner per 8 C.F.R. § 103.5a(a)(1). *Cf.* 8 C.F.R. § 103.5(a)(2)(3)(iii) (expressly providing that a motion to reopen a case denied due to abandonment may be based on the assertion that the request for additional evidence was sent to the wrong address.)

On September 5, 2006, the petitioner filed a motion to reopen and/or reconsider the director's rejection of the late appeal. Counsel noted that while the director correctly issued the notice to deny the concurrently filed Form I-485 Application to Register Permanent Residence or Adjust Status, the revocation of the approval of the petition was sent to the wrong address.

On May 29, 2007, the director dismissed the motion, concluding that no error had occurred in the issuance of the notice of intent to revoke. The director certified this decision to this office pursuant to the regulation at 8 C.F.R. § 103.4(a)(1) and afforded the petitioner 30 days in which to supplement the record pursuant to the regulation at 8 C.F.R. § 103.4(a)(2). In response, counsel submitted a brief and the petitioner's statement chronicling his change of address actions with Citizenship and Immigration Services (CIS) and his history of representation.

Part 1 of the petition filed on September 24, 1999 lists the petitioner's address in care of his attorney at the time, [redacted] The Form G-28, Notice of Appearance, for this attorney lists the petitioner's address in Saudi Arabia. The record contains a more recent Form G-28 for attorney [redacted] dated September 16, 2004. This notice lists the petitioner's address as his current address in Sacramento. Significantly, the record also contains a December 14, 2004 letter from the petitioner advising that he no longer had an attorney and providing his current address in Sacramento. Citizenship and Immigration Services used this address for all notices regarding the petitioner's adjustment application. Despite these notices of the petitioner's new address, contained in the record and utilized in the

adjustment proceeding, the director issued both 2006 notices regarding the self-petition, the NOIR and the NOR, to the petitioner's first attorney, [redacted]

In light of the above, we withdraw the director's claim in the May 29, 2007 decision that CIS had not erred. The issuance of the NOIR to the petitioner's initial attorney when he had previously submitted a Form G-28 for a new attorney with a new address and subsequently (but still prior to the issuance of the NOIR) filed a change of address advising that he was not represented by counsel, was in error. Thus, we must remand the matter to the director for proper issuance of a new NOIR to current counsel and the petitioner. When issuing the new notice, however, the director shall consider the following.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability and as an advanced degree professional. If the director finds that the petitioner is an advanced degree professional however, the issue of whether the petitioner is also an alien of exceptional ability is moot. We note that the exceptional ability classification normally requires an alien employment certification approved by the Department of Labor (DOL). The director should not conclude that meeting the regulatory requirements for that classification in and of itself warrants a waiver of the alien employment certification in the national interest. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215, 222 (Comm. 1998).

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its

report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. at 215, has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

It is imperative that the petitioner provide more information regarding his initial plans and evidence that he is pursuing the same plans. We note the following two issues:

- If the petitioner intends to work as a physician, the director may wish to inquire how this work would provide benefits that are national in scope. The director should carefully consider the language set forth in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217, n.3.

- If the petitioner intends to work as a researcher, the director may wish to inquire as to whether, as of the date of filing, the petitioner had a track record of success with some degree of influence on the field as a whole. *Id.* at 219, n.6.

Notably, the petitioner must demonstrate his eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The petitioner also may

not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Thus, the petitioner may not rely on employment he will not be qualified to perform until he completes of his Master's studies, begun after the petition was filed.

Therefore, this matter will be remanded for service of a new NOIR to the petitioner at his correct address and to his current attorney and which takes into account the eligibility issues raised above. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, *regardless of outcome*, is to be certified to the Administrative Appeals Office for review.